As has heretofore been stated, petitioner, neither in its brief below nor in its petition in this Court, has cited any case which supports its position. The two cases cited in the petition, which also were relied upon by the trial court below, viz., *The Portuguese Prince*, 209 Fed. 995 (SDNY, 1913), and *Federal Insurance Co.* v. *American Export Lines, Inc.*, 113 F. Supp. 540 (SDNY, 1953), are not authority for petitioner's contention and, in fact, they support the decision of the appellate court. In the *Portuguese Prince* case, the cargo was not delivered to a lighter, but onto a dock where it was damaged without negligence on the carrier's part. In *Federal Insurance Company* v. *American Export Lines, supra*, the bill of lading clause relied upon was that lighterage is "at the risk and expense of the goods". The Court said, however, that (p. 542):

> "* * * in so far as it transferred from the ship to cargo the risk of damage arising out of negligence or fault (it) would have been void * * * under Section 1 of the Harter Act".

While the District Court, as well as petitioner, cited no case supporting the contention that the Harter Act is inapplicable, respondent cited the following cases which declare invalid bill of lading clauses of the character of 1, 4 and 12 of petitioner's bill of lading, which purport to exonerate carriers from liability for damage to cargo on lighters, occurring through negligence:

Isthmian S. S. Co. v. *California Spray-Chemical Corp.*, 290 F. (2d) 486, 489 (9 Cir. 1961); original opinion adhered to on rehearing, 300 F. (2d) 41, 45-47 (9 Cir. 1962);

North American Smelting Co. v. *Moller S. S. Co.*, 204 F. (2d) 384, 386, 388 (3 Cir., 1953);

Morris v. *Lamport & Holt, Ltd.*, 54 F. (2d) 925, 926 (SDNY 1931), affd. *per curiam*, 57 F. (2d) 1081 (2 Cir. 1932);

Remington Rand, Inc. v. *American Export Lines*, 132 F. Supp. 129, 138-139 (SDNY, 1955);
Federal Insurance Co. v. *American Export Lines*, 113 F. Supp. 540, 542 (SDNY, 1953).

It is asserted in the petition (p. 13) that the decision of the appellate court below is in conflict with the following early decisions of this Court:

Calderon v. *Atlas S. S. Co.*, 170 U. S. 272 (1898);
The Delaware, 161 U. S. 459 (1896);
Constable v. *National Steamship Co.*, 154 U. S. 51 (1894; accident occurred in 1883);
The Eddy, 72 U. S. 481 (1866);
The Tangier, 64 U. S. 28 (1859).

Three of the foregoing cases arose prior to the passage of the Harter Act of February 13, 1893, and not in any case was the issue presented of the validity of a bill of lading exculpatory clause in a lighterage situation.

The petitioner asserts that exculpatory clauses 1, 4 and 12 in its bill of lading are in common use in most bills of lading issued in ocean commerce; long antedating the passage of both the Harter Act and the Carriage of Goods by Sea Act (petition, p. 12); and that the decision of the appellate court below "would force ocean carriers to take on the obligation of lighterage at foreign ports . . ." (petition, p. 13). We submit that the length of time carriers have been securing protection for cargo losses on lighters under invalid bill of lading clauses is not persuasive. Aside from the consideration that the clauses are violative of the Harter Act, this Court has held that the observance of a negligent custom affords no legal excuse for not exercising "that degree of care which ought to have been observed". *Wabash Railway* v. *McDaniels*, 107 U. S. 454, 461 (1882).

Petitioner's contention that the Tripoli Port Regulations extinguished its obligation to respondent's cargo upon

release from its ship's tackle, violates the language and spirit of the Harter Act.

The question of when a common carrier's responsibility ceases in respect of cargo shipped from an American port and discharged to a lighter at the port of destination, is governed by Federal Statutes and the decisions of Federal Courts construing those statutes—and not by a Tripoli port regulation. The same contention was advanced by the carrier in *California Spray-Chemical Corp., supra* (300 F. (2d) 41). That Court observed that the Harter Act (46 U. S. Code, Secs. 190-193) contemplates

> "a *carrier liability* which continues up until 'proper delivery' has been effected, regardless of when the carrier's *obligation to transport* the goods ceases" (Emphasis by Court.) (p. 46).

We submit it is a hitherto unheard of doctrine which would permit a port regulation of a foreign country to replace the basic policy of the Harter Act of making a carrier responsible for a "proper" delivery. In that case, the carrier pleaded an Egyptian customs regulation as an excuse for the carrier's failure to make proper delivery. The regulation was held not to have absolved the carrier from liability for the damage to the cargo which occurred on the lighter because the Harter Act impliedly assumed that the cargo had left the ship's tackle and

> "* * * that from that time until proper delivery has been completed no exculpatory clause can save the shipowner from his liability for failure to care properly for the cargo or to make 'proper delivery'" (290 F. (2d) 486, 489).

Question 3. Petitioner here presents the inquiry of whether it was error for the Court of Appeals to apply against it the presumption that its lighter was unseaworthy because it listed in calm weather, where (1) it did not own, operate or control the lighter, and (2) libellant's surveyor who investigated the cause of the accident refused to produce the report of his finding, and (3) no notice of claim was filed against petitioner.

As to (1) above, the unchallenged facts are that the consignee was neither consulted by the petitioner's Tripoli agent concerning the use of the lighter, nor notified of the discharge of its tractors thereon (R. Vol. I, p. 64). Rippon & Son, petitioner's agent for many years at Tripoli (R. Vol. I, pp. 39, 43, 62) had hired the lighter and had employed the stevedores to unload the tractors thereon (R. Vol. I, pp. 12, 19). In view of the invalidity of petitioner's clauses 1, 4 and 12, it seems clear that respondent's tractors were in the custody of the petitioner and, as it adduced no proof to explain the cause of the careening of the lighter in fair weather and calm sea (R. Vol. I, pp. 20-21, 29), we submit that it was an appropriate situation for the application of the presumption of unseaworthiness.

Commercial Corp. v. *N. Y. Barge Corp.*, 314 U. S. 104, 111 (1941);
The Jungshored, 290 Fed. 733, 734-735 (2 Cir., 1923); cer. den. 263 U. S. 707;
The T. J. Hooper, 60 F. (2d) 737, 738 (2 Cir., 1932);
The Buffalo, 56 F. (2d) 738, 739 (2 Cir., 1932).

Petitioner's assertion (petition, p. 17) that "clean receipts" were given by the lighterman and Port authorities is apt to be misleading. The receipts actually were given after the tractors had been cast into the harbor. No

notations of damage were endorsed thereon because of petitioner's insistence that its responsibility ceased the moment the tractors left the ship's tackle—at which time the tractors were in good condition. A few moments thereafter the lighter careened, resulting in water damage to the tractors, which is the basis of the present litigation.

As to (2) above, petitioner advanced the same contention in the appellate court, viz., that respondent's surveyor refused to produce a report of his investigation, which assertion was given no recognition by that Court. Correspondence with the surveyor's principals in Tripoli, copies of which were annexed to respondent's brief in the Court of Appeals, indicate that the surveyor did not prepare a report. Petitioner has not included that correspondence in its Appendix. It was petitioner's, and not respondent's obligation to explain the cause of the accident (*Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104, 110-111 (1941); *Schnell* v. *The Vallescura*, 293 U. S. 296, 303-304 (1934)). A cargo owner is not required to furnish an explanation where the carrier fails to do so.

As to (3) above, viz., that respondent did not file claim as provided by Sec. 3(6) of COGSA (46 U. S. Code, Sec. 1303(6)), the Act provides merely that where no notice of claim is filed with the carrier within the specified period, it is *prima facie* evidence of the delivery by the carrier of the goods described in the bill of lading. The effect of non-compliance with that Section is that the cargo owner

> "merely has to bear the additional burden of showing that the loss of which he complains did not occur after the goods left the possession of the carrier". (Knauth—Ocean Bills of Lading, 1953, at p. 274.)

The casting of the tractors into the harbor was observed by petitioner's chief officer (R. Vol. II, p. 12). He informed

the representatives of petitioner's local agent, who came aboard the ship the same day, of the circumstances attending the accident (R. Vol. I, p. 20).

The removal of the tractors from the sea was effected by Rippon, petitioner's agent, who had hired the lighter and stevedores (R. Vol. I, pp. 12, 19); petitioner, therefore, was fully informed as to the accident and damage to the tractors and that it occurred before delivery to the consignee (R. Ex. 6, Vol. 1, p. 83).

The unsubstantial character of the foregoing "question", as a basis for the granting of a writ is, we submit, readily apparent.

Question 4. Petitioner here assigns error to the appellate court upon the ground that it "failed to apply the 'clearly erroneous' standard of review to the findings of fact made by the Trial Court" (Petition, p. 17).

Petitioner lists seven findings which it asserts were "brushed aside" by the appellate court (Petition, pp. 17-18).

Finding 1 is that the parties contemplated that delivery would take place on a lighter; and Finding 2 is that the lighter was not operated by petitioner, but by Rippon. Those findings were made by the District Court upon the erroneous assumption that lighterage clauses 1, 4 and 12 of petitioner's bill of lading terminated its liability, when the tractors left the ship's tackle. The decision of the appellate court below that petitioner's said clauses are invalid and that petitioner was required to make a "proper delivery" which included the selection, manning and operation of a seaworthy lighter, established the error of the District Court's findings, which were predicated upon the aforesaid bill of lading lighterage clauses being valid. The

language of the opinion (Petition, App. C, pp. 15a-18a) shows that the appellate court had a "definite and firm conviction that a mistake had been committed" by the District Court: the "clearly erroneous" concept of *McAllister v. United States*, 348 U. S. 19, 20 (1954) thereby was served by the appellate court's ruling.

Finding 3 is that the petitioner had no choice of lighters. The implication of this finding is that petitioner could not refuse to transfer respondent's tractors to an unseaworthy craft. We submit that no extended discussion is required to refute this manifestly erroneous contention.

Finding 4 is that the shipowner was not permitted to remove the lighter manhole covers or pump its tanks. If such a practice existed—and there is testimony by the official in charge of the lighters to the contrary (R. Vol. I, p. 60)—petitioner's duty to the tractors required it to make application to the U. S. Army authorities, the owner of the lighter, or the Tripoli Port & Lights Department, from whom petitioner hired the same, to ascertain whether the tanks contained water. The ship's chief officer conceded that the lighter's tanks should have been checked (R. Vol. I, pp. 28-29). "Due diligence" under both the Harter Act (46 U. S. Code, Secs. 190-191), and COGSA (46 U. S. Code, Sec. 1303(1)(2)) required that such action be taken in view of the known instability of that pontoon type of lighter when its tanks contain water (R. Vol. I, p. 59). Because of the above statutory duty, the alleged existence in the port of Tripoli of a practice of ship's agents to refrain from opening manhole covers and pumping tanks, affords petitioner no protection, for this Court has held that the standard of care generally observed is not a legal excuse, if it is not the care which ought to have been exercised having regard to the exigencies of the particular service.

Texas and Pacific Ry. Co. v. Behymer, 189 U. S. 468, 470 (1903);

Wabash Railway v. *McDaniels*, 107 U. S. 454, 459-461 (1882);

The T. J. Hooper, 60 F. (2d) 737, 740 (2 Cir., 1932);

The opinion of petitioner's chief officer that the tanks should have been checked (R. Vol. I, pp. 28-29) represents the extent of petitioner's obligation to the cargo loaded on the lighter.

Finding 5—that the ship's stevedore made a normal and reasonably careful inspection. As was held by the appellate court, "a finding of due care in the selection of the lighter could not be sustained" upon proof that petitioner's agent, a stevedore foreman,

> "allegedly took a 5 or 10 minute walk over the deck of the lighter, prior to the tractors off-loading, but no attempt was made to ascertain whether water was in the lighter's tanks, and no inspection was made of the lighter's sides" (Petition, App. C, p. 19a).

The inadequacy of such inspection, we submit, requires no comment.

Finding 6—that the lighter was seaworthy—is refuted by the admission of petitioner's chief officer that it careened in fair weather and a calm sea, in respect of which event he had no explanation (R. Vol. 1, pp. 20-21, 29). This proposed finding is erroneous as a matter of law because of the presumption of unseaworthiness which arises under such circumstances (*Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941), and other cases cited on page 13 of this brief).

Finding 7—that the loss was not caused by respondent's negligence—is erroneous because of the reason

assigned by the appellate court, viz., that respondent had established a *prima facie* case of showing that the tractors were received at destination damaged and that petitioner had failed to prove that the loss was due to an excepted cause (Petition, App. C, p. 18a).

Schnell v. *The Vallescura*, 293 U. S. 296, 304 (1934);

Schroeder Bros., Inc. v. *The Saturnia*, 226 F. (2d) 147, 149 (2 Cir., 1955).

The issues as to due diligence and seaworthiness sought to be reviewed by petitioner were decided by the appellate court below on decisions of this Court, and other Federal courts, upon fundamental rules of admiralty law governing actions for cargo damage.

We submit that the proof offered by petitioner at the trial was of such sketchy and tenuous character that the ruling of the Court of Appeals in rejecting the District Court's finding is not "clearly erroneous" but, on the contrary, is eminently correct.

The appellate court's construction of the Harter Act is in accordance with its plain meaning. There is no decision of the Second, or any other, Circuit in conflict. So far as our research of the law has disclosed, every reported decision presenting a similar set of facts is in accord with the decision of the appellate court below which petitioner seeks to have reviewed. Petitioner has cited no case in point to the contrary.

Conclusion.

As the petitioner has failed to show any conflict of decision, or to present any important question of interpretation of Federal statutes which should be decided by this Court, it is respectfully submitted that the petition for a writ of certiorari should be denied.

F. Herbert Prem,
Counsel for Respondent.